

FELONY DUI/PHYSICAL CONTROL

or What Has the Legislature Done to Us Now?

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I. The Law (effective July 1, 2007)

RCW 46.61.502 DUI // RCW 46.61.504 Physical Control

- (6) It is a class C felony punishable under [the SRA], or [Juvie SRA], if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or
(b) the person has ever previously been convicted of vehicular homicide(dui)[in Washington], or vehicular assault(dui)[in Washington].

RCW 46.61.5055 (4)

A person who is convicted of [DUI] or [Physical Control] and who has four or more prior offenses within ten years, or

who has ever been previously convicted of [vehicular homicide(dui) in Washington] or [vehicular assault(dui) in Washington],

shall be punished in accordance with [the SRA].

II. What are the predicate crimes? How do we define "*prior offenses*?"

RCW 46.61.5055(13)

For purposes of this section and RCW 46.61.502 and RCW 46.61.504:

(a) A "prior offense" means any of the following:

- (i) A conviction for [DUI]
- (ii) A conviction for [Physical Control]
- (iii) A conviction for [vehicular homicide (dui) in Washington]
- (iv) A conviction for [vehicular assault (dui) in Washington]
- (v) A conviction for [DUI amended to Neg 1°, reckless driving, or reckless endangerment]
- (vi) out-of-state conviction of (i) through (v)
- (vii) A deferred prosecution [for DUI or Physical Control]
- (viii) A deferred prosecution for [DUI amended to Neg 1°]

(b) "Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense;

(c) "Within ten years" means that the arrest for a prior offense occurred within ten years of the arrest for the current offense.

Under the plain meaning of the term, "within seven years" encompasses the period before and after the arrest for the current offense. City of Seattle v. Quezada, ___ Wn. App. ___, WL 4227088 (Div.1 12/3/2007).

"Granting" of a prior deferred prosecution for driving under the influence of alcohol (DUI) triggers its treatment as a prior offense in subsequent DUI offenses for sentencing purposes. City of Kent v. Jenkins, 99 Wn. App. 287, 992 P.2d 1045, rev. denied 141 Wn.2d 1007 (2000).

Entry of deferred prosecution and the revocation/conviction following are counted as one prior offense. City of Seattle v. Quezada, ___ Wn. App. ___ WL 4227088 (Div.1 12/3/2007).

IV. Hurdles to note with Felony DUI

1. Accurately identifying p/c for charge before D pleads to gross misd.
2. Obtaining certified documents to prove priors.
3. Proving constitutional validity of priors (represented by atty/adequate waiver; same individual)

V. Identifying Felony DUIs

1. Arresting officer should ask about prior DUI arrests (admissions can be useful to prove priors). Check DOL record at time of arrest. Be alerted to refusals (may be because already in system). Get SW for blood!
2. DISCIS /NCIC check for all DUIs

VI. Certified

1. Get everything you can because never know what will help: J&S, and Docket, Charging document, Plea Form, Petition for Deferred, Order of Deferred. (note DWLS 2° convictions might help prove prior it was based on). CCDR with ADR.
2. Court Clerk who can testify about DISCIS

VII. Proving Priors

1. Need to prove the prior offense (1) fits the definition and (2) is within the required ten-year time frame and (3) is the defendant. The statute 'requires a constitutionally valid predicate conviction.' State v. Reed, 84 Wn. App. 379, 384, 928 P.2d 469 (1997) (felony firearm statute).

Crimes requiring a predicate offense conviction cannot be sustained where there is ambiguity in the predicate offense conviction. State v. Green, 94 Wn.2d 216, 231-33, 616 P.2d 628 (1980).

[The COA] may rely on documents in the record to clear up this ambiguity. When a trial court determines the factual basis for a guilty plea, it may consider any reliable source of information in the record at the time of the plea. State v. Arnold, 81 Wn. App. 379, 382, 914 P.2d 762, review denied, 130 Wn.2d 1003 (1996); see also State v. Osborne, 102 Wn.2d 87, 95, 684 P.2d 683 (1984).

2. Prior offenses are elements of the crime, so cannot be bifurcated from DUI trial. D can stipulate, ala the UFA trials and/or, D can request a limiting instruction. WPIC 5.30, for example:

Evidence has been introduced in this case on the subject of [2003 DUI] for the limited purpose of [proving that the defendant was arrested/convicted of this offense]. You must not consider this evidence [for any other purpose] [for the purpose of [proving that defendant was DUI on the current occasion?]].

State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990)(must be given if asked for) but no precedent for these cases.

3. The D can challenge the constitutional validity of a prior conviction that is an essential element of the current charge. The defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. Only after the defendant has made this initial showing does the State's burden arise.

Once a defendant calls attention to the alleged unconstitutionality of a plea of guilty to a prior [crime] sought to be used by the State to support a charge [], the State must prove beyond a reasonable doubt, that the plea was made voluntarily. State v. Summers, 120 Wn.2d 801, 811, 846 P.2d 490 (1993) (Firearm possession charge).

- a. Waiver of Counsel/Represented
 - * check docket for names of defense atty
 - * check plea and J&S for atty name
 - * check for signed waiver

- b. Same person in current as prior
 - * booking photos and prints
 - * witnesses in priors (arresting ofc, passengers in car, etc)
 - * probation officer (past and present)
 - * felony J&S has prints
 - * out-of-state felonies have "penpacks"
 - * prior DPA
 - * prior defense atty (if there is no other feasible alternative to obtain the information. RPC 3.8(e)
 - * handwriting comparison of signatures can be done by jury without expert testimony

VIII. Sample of Charging Language (King County):

On or about the [], the defendant drove a vehicle within this state

(a) and while driving had an amount of alcohol in his/her body sufficient to cause a measurement of his/her breath to register 0.08 grams or more of alcohol per two hundred ten liters of breath within two hours after driving, as shown by analysis of the defendant's breath;

OR

(b) and while driving had an amount of alcohol in his/her body sufficient to cause a measurement of his/her blood to register 0.08 percent or more by weight of alcohol within two hours after driving, as shown by analysis of the person's blood;

OR

(c) while under the influence of or affected by intoxicating liquor or any drug;

OR

(d) while under the combined influence of or affected by intoxicating liquor and any drug;

AND

having at least four prior offenses, as defined under RCW 46.61.5055(13)(a), within ten years of the arrest for the current offense

OR

having previously been convicted of vehicular homicide while under the influence of intoxicating liquor or any drug, a violation of RCW 46.61.520 (1)(a),

OR

having previously been convicted of vehicular assault while under the influence of intoxicating liquor or any drug, a violation of RCW 46.61.522(1)(b);

IX. Sentencing

1. Felony DUI is a Class C felony, punishable by 5 years/\$10,000 max.
It is a "crime against persons" RCW 9.94A411(2)(a).
So good time is up to 1/3 off. Community custody is 9-18 mos.

It is a seriousness level V crime (making it higher than vehicular assault (dui/reckless manner) at IV).

RCW 9.94A.525(e) calculates the offender score:

. . . prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be considered "prior offenses within ten years" as defined in RCW 46.61.5055.

Class A felonies count for life

Class B felonies count for 10 years (washout provisions)

Class C felonies count for 5 years (washout provisions)

Felony DUI count for 5 years (except really 10 years from arrest to arrest)

Serious Traffic (DUI, Physical Control, Reckless Driving, & Hit& Run(attended)) count for 5 years (washout provisions) (except really 10 years from arrest to arrest).

0	1	2	3	4	5	6	7+
6-12	12+-14	13-17	15-20	22-29	33-43	41-54	51-60

RCW 9.94A.525(11):

Prior adult and juvenile vehicular homicide & vehicular assault x 2

Other prior adult felony and serious traffic score x 1

(juvie felonies and serious traffic score $\frac{1}{2}$)

DOSA **not** available. RCW 9.94A.660(1)(b).

1st Offender Waiver is **not** available. RCW 9.94A.650(1)(e).

Work Ethic Camp **not** available. RCW 9.94A.690(1)(a)(iii)

IID provisions apply. RCW 9.94A.603(3)

DOL revocation/suspension applies. RCW 9.94A.603(2)

Mandatory Alcohol/substance abuse treatment and D shall pay (unless found indigent w/o insurance). RCW 9.94A.603(1)